

CLERK'S COPY

## TRANSCRIPT OF RECORD

---

---

Supreme Court of the United States

OCTOBER TERM, 1938

No. 715 / 3

KIM YOUNG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

---

---

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF LOS ANGELES COUNTY, CALIFORNIA

---

---

FILED MARCH 1, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715

KIM YOUNG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF LOS ANGELES COUNTY, CALIFORNIA

INDEX.

	Original	Print
Proceedings in Appellate Department of Superior Court of Los Angeles County .....	1	1
Citation ..... (omitted in printing) .....	1	
Record from Municipal Court of City of Los Angeles .....	2	1
Notice of appeal to Appellate Department .....	2	1
Engrossed statement on appeal .....	3	1
Exhibit "A"—Handbill .....	7	4
Affidavit of service .....	8	
Opinion, Bishop, J. ....	10	5
Petition for rehearing .....	22	12
Order denying rehearing .....	24	12
Petition for appeal, assignments of error and prayer for reversal .....	25	13
Order allowing appeal .....	69	15
Bond on appeal .....	71	
Stipulation as to transcript of record .....	78	16
Complaint in Municipal Court .....	84	17
Minutes of Municipal Court .....	88	18
Arraignment and plea .....	88	18
Order of dismissal .....	89	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 26, 1939.

## INDEX

Record from Municipal Court of City of Los Angeles—Continued.

	Original	Print
Notice of appeal .....	90	19
Remittitur of Superior Court .....	91	19
Argument and submission .....	91	20
Verdict of jury .....	93	20
Order denying motion for new trial .....	93	21
Judgment .....	94	21
Notice of appeal .....	94	21
Remittitur of Superior Court .....	95	22
Clerk's certificate .....	(omitted in printing)	97
Statement of points to be relied upon and designation as to printing record .....	99	22

[fol. 1] Citation, in usual form, filed February 20, 1939,  
omitted in printing.

[fol. 2]

**IN MUNICIPAL COURT OF CITY OF LOS ANGELES**

No. 82837

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and  
Respondent,

vs.

KIM YOUNG, Defendant and Appellant

NOTICE OF APPEAL—Filed October 6, 1938

To the Municipal Court of the City of Los Angeles, County  
of Los Angeles, State of California:

Notice is hereby given that the defendant Kim Young  
intends to and hereby does appeal from the judgment and  
sentence in this cause to the Appellate Department of the  
Superior Court of the County of Los Angeles, State of  
California.

Gallagher, Wirin & Johnson, by A. L. Wirin, At-  
torneys for Defendant.

(Endorsed:) No. CR A 1547. Received copy of the within  
Notice this 16 day of Sept. 1938. G. W. Adams, D. C. A.,  
Attorney for Plaintiff.

[File endorsement omitted.]

**[fol. 3] IN MUNICIPAL COURT OF CITY OF LOS ANGELES**

**ENGROSSED STATEMENT ON APPEAL**

Be it Remembered that pursuant to, and in accordance  
with, the Order and Judgment of the Appellate Department  
of the Superior Court of the State of California, in and  
for the County of Los Angeles, made and entered on the  
29th day of July, 1938, reversing the judgment of dismissal  
theretofore entered in the above entitled cause and remand-

ing said cause to the Municipal Court for further proceedings, said matter came on regularly for trial before Judge Alfred E. Paonessa in Division 6 of the above entitled court upon assignment from Division 7 thereof, on the 7th day of September, 1938, the plaintiff and respondent appearing by Ray L. Chesebro, City Attorney and by David M. Hoffman, Deputy City Attorney and the defendant and appellant appearing by Gallagher, Wirin and Johnson, by Leo Gallagher.

The defendant was charged with a Violation of Section 28.01 of the Los Angeles Municipal Code (Ordinance No. 77,000), as fully set forth in the complaint on file herein.

Thereupon objections by the defendant that the said Ordinance on its face and as applied to the defendant was [fol. 4] unconstitutional and void and of no force and effect, on the ground that it constitutes a denial of freedom of speech and freedom of the press, as guaranteed to the defendant by the due process clause of the Fourteenth Amendment to the Constitution of the United States, were overruled by the court.

Evidence was introduced by the People that the defendant, on the 17th day of March, 1938, on a public sidewalk in the City of Los Angeles, County of Los Angeles, State of California, adjacent to the Shrine Auditorium in said City, distributed handbills to pedestrians upon said sidewalk, a copy of the handbills so distributed being introduced in evidence and marked People's Exhibit "A", which said exhibit is hereto annexed. The evidence also showed by stipulation that the defendant had at the same time and place, more than three hundred (300) handbills of the same type and nature as the handbills introduced in evidence, which said handbills the defendant was proceeding to distribute to persons on said sidewalk.

Thereupon the defendant gave a notice of intention to move for a new trial, and on the 13th day of September, 1938, said defendant by his counsel urged that a new trial be granted on the ground that said Ordinance was not constitutional on its face and as applied to the defendant, in that it denies to defendant due process of law under the 14th Amendment to the Constitution of the United States [fol. 5] and freedom of speech and freedom of press under the First and Fourteenth Amendments to the Constitution of the United States.

The court denied said motion for a new trial and imposed a sentence of five days in the City Jail, which said sentence the said court suspended.

Defendant and Appellant appeals from the said judgment and sentence on the following grounds, to-wit:

1. That Los Angeles Municipal Code, Section 28.01 (Ordinance 77,000) is unconstitutional and void and of no force and effect in that said Ordinance on its face denies to the defendant due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and freedom of speech and freedom of press, as provided in the First and Fourteenth Amendments to the Constitution of the United States;
2. That said Ordinance, as applied, administered and enforced against the defendant and appellant, denies to said defendant and appellant due process of law under the Fourteenth Amendment to the Constitution of the United States and freedom of speech and freedom of the press under the First and Fourteenth Amendment to the Constitution of the United States, in that the handbill alleged to [fol. 6] have been distributed by the defendant was and is a political, as distinguished from a commercial, handbill;
3. That the judgment and sentence of said court constitutes a denial to the defendant of due process of law under the Fourteenth Amendment to the Constitution of the United States and of freedom of speech and of the press, in that said judgment and order and said Ordinance fail to establish a reasonably ascertainable standard of guilt, and fail to adopt and correctly to apply the "clear and present danger" rule;
4. That said judgment and sentence are, and each of them is, in contravention of the decision of the Supreme Court of the United States in Lovell v. Griffin, 82 L. Ed. (Adv. Op.) 660.

The court does now hereby settle and allow the foregoing Engrossed Statement on Appeal and certifies that the same is a full, true and correct statement of all of the testimony, evidence and proceedings had and received in said cause.

Dated this 4th day of October, 1938.

Alfred E. Paonessa, Judge of the Municipal Court.

[fol. 7] EXHIBIT "A" TO STATEMENT ON APPEAL

BACK FROM  
WAR-TORN SPAIN

Captain:  
**HANS AMLIE**

Commander Lincoln Battalion  
Brother of Congressman Amlie

**JAY ALLEN**  
War Correspondent Expelled From Rebel Spain

**PEPI JUNEDA**  
Famous Spanish Dancer

**PILAR ARCOS**  
Spanish Actress and Singer

**Chairman, LILLIAN HELLMAN**  
Screen writer and playwright

**TRINITY AUDITORIUM**  
847 So. Grand Ave.

March 21, —— 8:00 P. M.  
Admission 25¢ and 50¢

AUSPICES: FRIENDS LINCOLN BRIGADE  
333 W. 2nd St. —— Mi. 7926

[fols. 8-9] Affidavit of service of statement on appeal  
omitted in printing.

[fol. 10] IN APPELLATE DEPARTMENT OF SUPERIOR COURT,  
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 1547

Trial Court No. 82837

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Re-  
spondent,

vs.

KIM YOUNG, Defendant and Appellant.

Appeal by defendant from a judgment of the Municipal  
Court of the City of Los Angeles, of conviction of violation

of section 28.01 of the Los Angeles Municipal Code. A. E. Paonessa, Judge. Affirmed.

For Appellant—A. L. Wirin.

For Respondent—Ray L. Chesebro, City Attorney, W. J. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney.

OPINION—Filed December 9, 1938

The provisions of the Municipal Code of the City of Los Angeles, which prohibit the distribution of handbills to pedestrians on the sidewalks of the city, do not, under the authorities, so infringe any constitutional right that they may be held inoperative. The judgment that the defendant-appellant pay a fine of \$25.00 for violating the ordinance is, therefore, to be affirmed.

The provisions of the Municipal Code which are involved appear in sections 28.00 and 28.01. There we find that "No [fol. 11] person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle" and by way of definition it is declared that "Hand-Bill shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

It may at times be a close question of fact, whether a person is actually "distributing" cards, which the municipal code prohibits, or whether he is passing out a card or two as an isolated casual or occasional act, which, under a proper interpretation of its provisions, the code does not prohibit. *Anderson v. State*, (1903) 69 Neb. 686, 689, 96 N. W. 149, 150, 5 Ann. Cas. 421; *Coughlin v. Sullivan*, (1924) 100 N. J. L. 42, 126 Atl. 177; *Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 354. In this case, however, it plainly appears that the defendant was engaged in the distribution of cards. He had in his possession over three hundred colored cards, three and a half by five and a half inches in size; some of these he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium, and, it was stipulated, he was "proceeding to distribute" the rest to other persons on the sidewalk. Obviously, the defendant violated the provisions of the Municipal Code,

[fol. 12] as he was charged with doing, and the judgment imposing sentence upon him must be affirmed unless in some way the state or federal constitution is offended by those provisions.

The Municipal Code's endeavor to create a public offense is futile, it is claimed, because contrary to the right to speak and publish freely, safeguarded by Art. I, section 9, of our state constitution, and by the Fourteenth Amendment to the federal constitution. The language of the former is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain, or abridge the liberty of speech or of the press." The Fourteenth Amendment does not in terms protect against an invasion of the right freely to speak and to publish, but in its fending against the deprivation of liberty without due process, the right is held to be fully guarded. Lovell v. Griffin, (1938) 82 Law. ed. Adv. Op. 660, 58 Sup. Ct. 666, and cases cited.

The right to speak and to publish freely is not an absolute one, free from all legislative control. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." Schenck v. United States, (1919) 249 U. S. 47, 63 L. ed. 470, 473. "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical [fol. 13] to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." Gitlow v. New York, (1925) 268 U. S. 652, 69 L. ed. 1138, 1146. Reasonable restrictions may be placed upon the time and place of the exercise of the right of free expression, as well as upon its content. In spite of the uncompromising language of our constitution, it was held in *In re Thomas*, (1909) 10 Cal. App. 375, that the city of Los Angeles could validly prohibit the making of a public speech in any public park or on any street, within a defined district. A similar ordinance of the city of Boston, prohibiting all public addresses, without a permit, in any of the public grounds of the city, was upheld by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Davis*, (1895) 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, the opinion being written by Mr. Justice Holmes, and it was thereafter held valid by the Supreme Court of the United States, in *Davis v. Commonwealth*, (1897) 167 U. S. 43,

42 L. ed. 71, 17 S. Ct. 731. The New York Court of Appeals held such a prohibitory ordinance to be constitutional in People v. Atwell; (1921) 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107 (Mr. Justice Cardozo concurring specially), and again in People v. Smith, (1934) 263 N. Y. 255, 188 N. E. 745. Still other cases, in accord, are reviewed in Conaghlin v. Chicago Park Dist., (1936) 364 Ill. 90, 4 N. E. (2d) 1, itself [fol. 14] reaching the same conclusion. While it may be said, as it was in the case of People v. Smith, *supra*, that an ordinance such as we have just been considering "is not aimed at free speech," it is plain that it nevertheless hits it. An ordinance which declares that one may not speak within a defined district, to that extent abridges the right to speak freely. Although there is an abridgement, the ordinance may still be valid, if the abridgement is not the end sought by the ordinance, but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. Such is the witness of the cases.

We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are "city" streets, under the council's charge; we hold that no restraint may validly be placed by public authority upon the constitutional right of free expression, whether it be to speak, pen or print, even upon the public streets, which is not justified by the evils which lack of restraint would bring about. We may not, however, substitute our judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions on the exercise of a constitutional right. It is only when we can [fol. 15] say that clearly the line of reasonable debate has been passed that we have the right to declare invalid the deliberate act of legislative body of the city.

Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack

of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in *Anderson v. State*, supra, 69 Neb. 686, 96 N. W. 149, 150, 5 Am. Cas. 241, as quoted in *City of Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 353: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition." The evil against which the code appears to have been directed [fol. 16] is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike.

It has been argued that the remedy for littered streets is not to prohibit the distribution of handbills, but to enforce the laws against letting them fall on the street or sidewalk. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often found best, by those who determine the public policy, to prohibit an act, innocent in itself, but which is in the chain of events leading to the evil. Of laws founded on this principle our federal Supreme Court stated in *Purity Extract & T. Co. v. Lynch*, (1912) 226 U. S. 192, 57 L. ed. 184, 185: "It does not follow that because a transaction, separately considered, is innocent, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Our conclusion that the individual's exercise of his constitutional right of free expression may be curbed by forbidding the distribution of handbills on public streets, finds support in the authorities. See *Anderson v. State*, supra, (1903) 69 Neb. 686, 96 N. W. 149; *City of Milwaukee v. Kassen*, supra, 203 Wis. 383, 234 N. W. 352; *Almassi v. City of Newark*, (N. J. Conn. Pl.) (1930) 150 A. 217; *Commonwealth v. Kimball*, (1938) — Mass. — 13 N. E. (2d) 18, 114 A. L. R. 1440. In support of principles

on which, in part, our conclusion is based, we find People v. St. John, (1930) 108 Cal. App. 779, 288 P. 53; Sieroty v. City of Huntington Park, (1931) 111 Cal. App. 377; and San Francisco Shopping News Co. v. City of South San Francisco, (1934) 69 F. (2d) 879 (certiorari denied, 293 U. S. 606). There are authorities not in harmony with our conclusion, as may be discovered in the notes in 22 A. L. R. 1484 and 114 A. L. R. 1446. In connection with some of these cases, those that are based in part on a strict construction of legislative grants of power to municipalities, this should be noted respecting the police power of California cities; within their boundaries they exercise "the entire police power of the state, subject only to the control of general laws." Sec. 11, Art. XI, State Constitution; In re Maas, (1933) 219 Cal. 422, 425.

Appellant earnestly urges that Lovell v. Griffin, *supra*, 82 Law ed. Adv. Op., 58 Sup. Ct. 666, is an authority requiring us to reverse this judgment. But we find nothing in the decision in that case to cause us to doubt the correctness [fol. 18] of our conclusion. The ordinance under consideration there differs from ours in a vital particular appearing in the supreme court's characterization of it: "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."

The distinction to which we refer is not, that under the Griffin city ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for under our ordinance. In effect the two ordinances are identical in this regard, for the supreme court looked upon the permit feature as a nullity; the ordinance with it, was measured as though it were without it. The circumstance that some of the ordinances prohibiting speaking in public parks and streets, permitted the speaking if a permit was obtained, was not made the basis of approving the ordinance in any of the cases we noted. The absence, in our ordinance,

[fol. 19] of any provision for a permit, neither strengthens it nor does it invalidate it.

The distinction between the Griffin city ordinance and the Los Angeles code which is both vital and obvious, is that the former prohibited the distribution of handbills and cards anywhere in the city, while the latter prohibits their distribution only in a very limited number of places, which cannot be said to be wholly unconnected with public welfare. The supreme court did not indulge in obiter dictum; that is, it did not say that an ordinance such as ours would be valid or invalid. It did point out, however, that the ordinance which it determined denied due process, was distinguishable from an ordinance such as ours in the particular we have emphasized, and thus did not extend its disapproval to an ordinance guarding against the littering of streets, which our ordinance (code) does.

Up to this point we have considered the validity of the provisions of the municipal code in question solely from the standpoint of the attack made upon them that they are destructive of the right freely to express one's views. It may be, however, that the real constitutional right involved is that rescued from an ordinance such as ours by *In re Thornburg*, (1936) 55 Ohio App. 229, 9 N. E. (2d) 516, where it was held that as the right to engage in business is a property right, to prevent one from advertising his business, by passing out cards on the sidewalk, is to deprive one of his property without due process. The cards which appellant [fol. 20] was distributing bore this message:

"Back from  
WEB TORN SPAIN"

Captain  
HANS AMLIE

Commander Lincoln Battalion  
Brother of Congressman Amlie

JAY ALLEN

War Correspondent Expelled from Rebel Spain

PEPI JUNEDA  
Famous Spanish Dancer

PILAR ARCOS  
Spanish Actress and Singer

Chairman, LILLIAN HELLMAN  
Screen Writer and Playwright

TRINITY AUDITORIUM  
847 So. Grand Ave.

March 21, —:— 8:00 P. M.

Admission 25¢ and 50¢

AUSPICES: FRIENDS LINCOLN BRIGADE

333 W. 2nd St. —:— MI. 7926

Mercury Printing Co., 855 N. Western Ave."

Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.

But if this be so, our conclusion is not thereby changed. We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty [fol. 21] without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit. Indeed, if we had to choose, we should follow Coughlin v. Sullivan, *supra*, 100 N. J. L. 42, 126 A. 177, in finding it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one's views on questions of public concern.

For the foregoing reasons, we are of the opinion that the judgment of conviction should be, and it is, affirmed.

Dated December 9, 1938.

Bishop, Judge.

We concur: Shaw, Presiding Judge. Schauer, Judge.

[File endorsement omitted.]

[fol. 22] IN APPELLATE DEPARTMENT OF SUPERIOR COURT OF  
LOS ANGELES COUNTY.

[Title omitted]

PETITION FOR REHEARING—Filed December 14, 1938

Comes now defendant and respondent and petitions the above entitled court for rehearing, and prays that the court order a rehearing of the above entitled matter and set aside its judgment and order herein.

That the grounds of said petition are as follows:

1. That the judgment, order and decision of the court constitutes a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States in that it denies to the defendant freedom of speech and freedom of the press.
2. That the judgment, order and decision of the court constitutes a denial to the defendant of due process of law under the Fourteenth Amendment to the Constitution of the United States and of freedom of speech and of the press in that it fails to establish a reasonably ascertainable standard of guilt and fails to adopt and correctly apply the clear and present danger rule.
3. That the judgment, order and decision of the court is [fol. 23] in contravention of the decision of the Supreme Court of the United States in Lovell vs. Griffin, 303 U. S. 444.

Respectfully submitted, Gallagher; Wirin and Johnson, by A. L. Wirin.

Dated at Los Angeles; December 14th, 1938.

(Endorsed:) No. CR A 1547. Received copy of the within petition, this 14 day of March, 1938. John L. Bland, D. C. A., Attorney for Respt.

[File endorsement omitted.]

[fol. 24] IN APPELLATE DEPARTMENT OF SUPERIOR COURT OF  
LOS ANGELES COUNTY

[Title omitted]

ORDER DENYING REHEARING—Filed December 14, 1938

Appellant's petition for a rehearing after judgment in the above entitled cause having been filed, and said petition having been duly considered,

It is Now Ordered that the said petition be, and the same is, hereby denied.

Dated December 14, 1938.

By the Court.

Shaw, Presiding Judge. Bishop, Judge. Schauer,  
Judge.

[File endorsement omitted.]

[fol. 25] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER  
FOR REVERSAL—Filed February 20, 1939

Considering himself aggrieved by the Final Judgment and Decision of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, in the above entitled cause, the petitioner hereby prays that an appeal be allowed to the Supreme Court of the United States.

SUMMARY STATEMENT OF THE CASE

The validity of a statute of the State of California within the meaning and intent of Section 237 (a) of the Judicial Code of the United States is drawn into question upon the grounds that said statute deprives appellant of liberty without due process of law and denies him freedom of speech and freedom of the press, as guaranteed by the Fourteenth [fol. 26] Amendment to the Constitution of the United States, said statute being a Municipal Ordinance of the City of Los Angeles, No. 77,000, sections 28.00 and 28.01, thereof.

The appellant was convicted in the Municipal Court of the City of Los Angeles for a violation of said Municipal Ordinance in that the appellant distributed to and among pedestrians on the streets of the City of Los Angeles a handbill, or card, announcing a public meeting in the Trinity Auditorium in the City of Los Angeles, under the auspices of the Friends of the Lincoln Brigade.

The judgment and decision of the Appellate Department of the Superior Court of Los Angeles County, State of California, upheld and sustained said ordinance and rejected the contentions of the appellant that the Municipal Ordinance was unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

The Opinion of the Appellate Department of the Superior Court is reported in 3 Cal. App. Supp. 62. The Judgment and Decision of the Appellate Department, as aforesaid, is a judgment of the court of last resort of the State of California in this case. Said judgment and decision was made and entered on the 9th day of December, 1938.

#### ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record [fol. 27] and proceedings in said case:

1. The Appellate Department of the Superior Court of Los Angeles County erred in its decision and judgment that Los Angeles municipal ordinance, section 28.00 and section 28.01, on its face and as enforced and applied to the appellant is valid and constitutional, and does not deprive the appellant of due process of law under the Fourteenth Amendment to the Constitution of the United States by denying the appellant freedom of speech and freedom of the press as guaranteed by said due process clause.
2. Said Superior Court erred in its decision and judgment in failing to adjudge said ordinance unconstitutional, as denying freedom of speech and freedom of the press under the Fourteenth Amendment to the Constitution of the United States in that said ordinance, on its face and as applied and enforced against the appellant, does not comply with the "clear and present danger" rule as enunciated by the Supreme Court of the United States; and in that said court failed to apply said rule in the instant case.
3. That said Superior Court erred in its decision and judgment in that it failed to rule and decide that Los An[ols. 28-68] geles municipal ordinance, section 28.00 and section 28.01, was and is unconstitutional by virtue of the decision of the Supreme Court of the United States in Lovell vs. Griffin, 303 U. S. 444.

#### PRAYER FOR REVERSAL

For which errors appellant prays that said judgment of the Appellate Department of the Superior Court of Los Angeles County, State of California, dated December 9,

1938, in the above entitled cause be reversed and a judgment rendered in favor of appellant, and for costs.

Gallagher, Wirin & Johnson, by A. L. Wirin, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 69]      SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 20, 1939.

The appellant in the above entitled matter, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled matter by the Appellate Department of the Superior Court of Los Angeles County, State of California, on the 9th day of December, 1938, and from each and every part thereof, and having presented his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It Is Now Ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Appellate Department of the Superior Court of [fol. 70] Los Angeles County, State of California, in the above entitled cause, as provided by law, and It Is Further Ordered that the Clerk of the Appellate Department of said Superior Court shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within sixty days of this date, and it is Further Ordered that security for costs on appeal be fixed in the sum of \$250.00.

Dated this 20th day of February, 1939.

Hartley Shaw, Presiding Judge, Appellate Department, Superior Court of Los Angeles County, State of California.

[File endorsement omitted.]

[fols. 71-77] Bond on Appeal for \$250.00, approved and filed February 20, 1939, omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed February 20, 1939

It Is Hereby Stipulated by and between the parties in the above entitled cause, through their counsel, that the following portions of the record be included in the transcript of the record in the above entitled cause to be prepared by the Clerk of the Appellate Department of the Superior Court, Los Angeles County, State of California, and to be transmitted to the Supreme Court of the United States:

1. Engrossed Statement on Appeal, dated Oct. 5, 1938
2. Complaint against defendant
3. Minutes of Municipal Court
4. Opinion of Court, dated December 9, 1938
5. Petition for Re-Hearing
6. Petition for Appeal, Assignment of Errors, and Prayer [fols. 79-83] for Reversal
7. Statement as to Jurisdiction
8. Order Allowing Appeal
9. Bond on Appeal
10. Citation
11. Notice Re: Rule 12, Paragraph 3, United States Supreme Court Rules
12. Acknowledgment of Service of Appeal Papers Upon Appellee
13. This Stipulation Indicating the Portions of the Record to be Included in the Transcript.

Dated this 20 day of February, 1939.

Gallagher, Wirin & Johnson, by A. L. Wirin, Counsel for Appellant. Ray L. Chesebro, City Attorney; W. Jos. MacFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, by John L. Bland, Counsel for Appellee.

[File endorsement omitted.]

[fol. 84]

39590.

## IN MUNICIPAL COURT OF CITY OF LOS ANGELES

[Title omitted]

COMPLAINT—Filed March 18, 1938

Personally appeared before me, this day of Mar. 18, 1938, C. L. Behrendt of Los Angeles City, who, first being duly sworn, complains and says:

That on or about the day of Mar. 17, 1938, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 28.01 of the Los Angeles Municipal Code (Ord. No. 77,000) was committed by Kim Young (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully distribute, in the City of Los Angeles, a handbill to and among pedestrians along and upon a street, sidewalk and park, and to passengers on a street car, and throw, place and attach a handbill in, to and upon an automobile and other vehicle.

All of which is contrary to the form of the Ordinances and Resolutions adopted and approved by the Municipal [fol. 85] authorities of said City, in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant (whose true name to affiant is unknown) and that he may be dealt with according to law.

C. L. Behrendt.

Subscribed and sworn to before me this day of Mar. 18, 1938, W. S. Dinsmore, Clerk of the Municipal Court of Los Angeles City, in said County and State, by J. Nicolais, Deputy Clerk. (Seal.)

(L. A. M. C. 28.01.)

[fol. 86-87] [File endorsement omitted.]

Issued by Ray L. Chesebro, City Attorney, by Robt. G. Wheeler, Deputy City Attorney.

Rob't. G. Wheeler.

Witnesses: M. J. Hess 1322, W. S. Jamison 846 (RU) (MET RU).

Clerk's certificate to foregoing paper omitted in printing.

## [fol. 88] IN MUNICIPAL COURT OF CITY OF LOS ANGELES

[Title omitted]

**Minute Entries**

Mar. 18, 1938. Complaint filed sworn to by C. L. Betrendt charging the Defendant with having on Mar. 17, 1938 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Violation of Sec. 28.01 Ord. 77,000.

Mar. 18, 1938. \$25—Cash Bail posted—Receipt 55871-H.

**ARRAIGNMENT AND PLEA**

Mar. 18, 1938. Cause called. Judge Kaufman presiding. Both parties ready. People represented by Rob't G. Wheeler (D. C. A.), Defendant in Pro. Per. Defendant in court, duly arraigned, informed of the charge against him, and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant in open court personally demands jury trial. Jury trial set for Mar. 25, 1938 at 9:30 A. M. in Div. 7. Bail Set at \$25.

[fol. 89] Mar. 25, 1938. Transferred to Div. 6 for trial.

Mar. 25, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher.

Mar. 25, 1938. Cause continued for trial to Mar. 28, 1938 at 10 A. M. because of crowded calendar.

Mar. 28, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher. Cause continued for trial to Mar. 29, 1938 at 10 A. M. because of crowded calendar.

Mar. 29, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher. Cause continued to Mar. 30, 1938 at 10 A. M. for trial.

**ORDER OF DISMISSAL**

Mar. 30, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.).

[fol. 90] Defendant in court and represented by Leo Gallagher.

It appearing to the Court that because of a recent United States Supreme Court decision, the ordinance under which this Defendant is charged is declared unconstitutional, and the case dismissed.

Bail Ordered Exonerated and ordered returned to Alexander Riskin.

#### NOTICE OF APPEAL

Mar. 31, 1938. Written Notice of Appeal filed.

Mar. 31, 1938. Plaintiff's proposed Statement on Appeal filed.

Apr. 7, 1938. Cause called. Judge Call presiding. People not represented. Defendant not represented. Cause set for settlement of Statement of Appeal for Apr. 15, 1938 at 9:30 A. M. in Div. 6.

Apr. 15, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.) Defendant in court and represented by Leo Gallagher. Statement on Appeal settled. E. Shinn (D. C. A.) to prepare a re-draft of Statement including and attaching thereto [fol. 91] a copy of the Handbill involved.

Apr. 19, 1938. Settled Engrossed Statement on Appeal filed.

Apr. 20, 1938. Miles on Appeal transmitted to Superior Court.

#### REMITTITUR OF SUPERIOR COURT

Aug. 10, 1938. Remittitur and Memorandum Opinion returned and filed. Judgment reversed and cause remanded for new trial.

Aug. 17, 1938. Cause called. Judge Freund presiding. Both parties ready. People represented by E. W. Lewis (D. C. A.), Defendant in court in Pro. Per. Cause reset for a jury trial Sep. 7, 1938 at 9:30 A. M. in Div. 7. Defendant released on own recognizance..

Sep. 7, 1938. Cause called. Judge Freund presiding. Both parties ready. People represented by H. McDonald (D. C. A.). Defendant in court and represented by Leo Gallagher. Transferred to Div. 6 for trial.

### ARGUMENT AND SUBMISSION

Sep. 7, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman [fol. 92] (D. C. A.). Defendant in court and represented by Leo Gallagher. The following jurors were sworn, examined and accepted:

- |                      |                       |
|----------------------|-----------------------|
| 1. Floretta Burdick. | 7. Bessie Solot.      |
| 2. John Watson.      | 8. Minnie Currier.    |
| 3. Alice Troupe.     | 9. Nathan Schiller.   |
| 4. Howard Gunn.      | 10. Esther Wilson.    |
| 5. Ashbury Winchel.  | 11. Geraldine Newton. |
| 6. Theron C. Wilson. | 12. Helen Swanson.    |

Jury sworn to try cause.

Witnesses for People: Merle J. Hess; stipulated other Officer, W. S. Jamison, would testify the same. Exhibits filed: People's #1 and #1-A (Handbills). Witnesses for Defendant: Merle J. Hess, Jas. Lundigan, Leo A. Kelly, Richard R. Romans, C. H. Holden, H. C. Bryan, Henry C. Wolpin, Chas. L. Knapp, John J. Monogue, Rob't F. Grady, Gilbert W. Johnston. Recess until 2 P. M. Jury admonished. At 2 P. M., Defendant, counsel and jury present.

Witnesses for Defendant: I. Roseman, Kim Young, Jas. E. Davis, Kim Young (recalled). Both sides rest. Cause argued in part by People. Cause re-opened. On motion of Defendant, witness for Defendant: Erzel Daniel. Both sides again rest. Argument concluded. Instructions given and attached to complaint.

[fol. 93]

### VERDICT OF JURY

Jury retired this Sep. 7, 1938 at 3:37 P. M. in charge of Bailiff Turner duly sworn. At this 5:34 P. M., jury returned into court with the following verdict:

"We, the Jury in the above entitled cause, find the Defendant guilty of the offense charged."

Floretta Burdick, Forewoman. Verdict filed. Defendant makes oral motion for a new trial.

Sep. 7, 1938. Cause continued to Sep. 12, 1938, at 2 P. M. for hearing on motion for a new trial and sentence.

Sep. 12, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by Leo Gallagher.

Motion for a new trial and sentence continued to Sep. 13, 1938 at 2 P. M. in Div. 14 at request of Defendant.

#### ORDER DENYING MOTION FOR NEW TRIAL

Sep. 13, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by Leo Gallagher.

Motion of Defendant for a new trial denied.

[fol. 94]

#### JUDGMENT

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense Violation of Sec. 28.01 Ord. 77,000 the said Kim Young be fined in the sum of 25 dollars and that in default of the payment of said fine on or before 5 o'clock P. M. of Sep. 13, 1938 the said Kim Young be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied, not exceeding 5 days, and that the Defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the date above prescribed.

Sep. 13, 1938. Sentence Suspended.

#### NOTICE OF APPEAL

Sep. 16, 1938. Written Notice of Appeal filed.

Sep. 21, 1938. Defendant's Proposed Statement on Appeal filed.

Sep. 26, 1938. Respondent's Proposed Amendments to Appellant's Proposed Statement on Appeal filed.

[fol. 95] Sep. 26, 1938. Settlement of Defendant's Statement on Appeal set for Oct. 4, 1938 at 11:30 A. M. in Div. 14. Counsel notified.

Sep. 28, 1938. Cause called: Judge Paonessa presiding. Both parties ready. People represented by D. M. Hoffman (D. G. A.). Defendant in court and represented by A. L. Wirin.

Settlement of Defendant's Statement on Appeal. Defendant's counsel states that he has no objections to the People's Proposed Amendments.

People to prepare Engrossed Statement on Appeal. Copy of People's Exhibit "1" ordered attached to Engrossed Statement on Appeal.

Oct. 5, 1938. Settled Engrossed Statement on Appeal filed.

Oct. 6, 1938. Files on Appeal transmitted to Superior Court.

#### REMITTITUR OF SUPERIOR COURT

Dec. 16, 1938. Remittititur returned and filed—Judgment affirmed—Order denying rehearing—Opinion—filed.

[fol. 96] I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

K. L. Holaday, Clerk of Municipal Court, City of Los Angeles, County of Los Angeles, State of California, by Katherine Christensen, Deputy. (Seal.)

February 23, 1939.

[File endorsement omitted.]

[fol. 97:98] Clerk's certificate to foregoing transcript omitted in printing.

#### [fol. 99] SUPREME COURT OF THE UNITED STATES

##### STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed March 8, 1939.

Appellant intends to rely upon the following points and, in support thereof, states that he believes that the entire record is necessary for the consideration thereof:

1. The ordinance under which appellant was convicted (Los Angeles Municipal Code Section 28.01) is unconstitutional on its face in that said ordinance violates appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by denying him freedom of speech and freedom of the press.

2. The ordinance under which appellant was convicted (Los Angeles Municipal Code Section 28.01) is unconstitutional as applied to appellant in that said ordinance denies appellant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, March 4, 1939.

Gallagher, Wirin & Johnson, Attorneys for Appellant. A. L. Wirin, of Counsel.

[fol. 100] Due and sufficient service of a copy of the attached document is accepted this 6th day of March, 1939.

Dated at Los Angeles this 6th day of March, 1939.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, by John L. Bland, Attorneys for Appellee, The People of the State of California.

[fol. 101] [File endorsement omitted.]

Endorsed on cover: In forma pauperis. File No. 43,200. California, Appellate Department, Superior Court. Term No. 715. Kim Young, Appellant, vs. The People of the State of California. Filed March 1, 1939, Term No. 715, O. T., 1938.